Supreme Court, U.S.
FILED

NO. 93 1126 JAN 5 1994

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1993

LOUISIANA POWER & LIGHT COMPANY
Petitioner

VERSUS

BARRY BOURGEOIS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

EUGENE G. TAGGART
RICHMOND M. EUSTIS*
CHARLES A. NUNMAKER
Monroe & Lemann
201 St. Charles Avenue
Suite 3300
New Orleans, LA 70170
(504) 586-1900

ATTORNEYS FOR PETITIONER
LOUISIANA POWER & LIGHT COMPANY

* Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

93PP

QUESTIONS PRESENTED

I. May a state court, sitting in an admiralty case of maritime allision, disregard the legality of a structure permitted under the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) to hold the structure owner at fault under a land-based "totality of the circumstances" rationale?

II. Is the injury to uniformity in the application of the admiralty and maritime laws of the United States engendered by the application of state-specific delictual standards in cases of collision or allision adequate justification for further review by this Honorable Court?

III. Considering that all owners of officially permitted structures located along and across the navigable waters of the United States are entitled to rely upon the navigational skill and prudence of mariners, and considering also the uniformity of the federal permitting system as applied to such owners, what justification exists for the type of amorphic, subjective analysis carried out by the courts below in this case and, assuming such justification might be found, is the federal permitting process of any value whatsoever?

LIST OF PARTIES

All parties to this case in the Louisiana state courts are identified in the caption hereof. The petitioner, Louisiana Power & Light Company, owns 33% of the common stock of System Fuels, Inc., a non-profit subsidiary (the remainder of such ownership being that of Arkansas Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc.). Louisiana Power & Light Company has no other subsidiaries. The common stock of Louisiana Power & Light Company is wholly owned by Entergy Corporation, the stock of which is publicly held. The preferred stock of Louisiana Power & Light Company is publicly held. In addition, Entergy Corporation is the sole holder of the common stock of Arkansas Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc. and System Energy Resources, Inc.; the preferred shares of Arkansas Power & Light Company, Mississippi Power & Light Company, and New Orleans Public Service Inc. are publicly held. The petitioner also reports that Entergy Corporation entered into a Reorganization Agreement with Gulf States Utilities Company. Pursuant to this agreement, a merger of these entities took place on December 31, 1993, resulting in the creation of a new Entergy Corporation that retains the same ownership interests set out above, in addition to owning all of the common stock of Gulf States Utilities Company. Entergy Corporation also wholly owns several subsidiaries that conduct business and/or own assets (wholly or jointly with others) domestically and in foreign countries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 3

FEDERAL STATUTORY AND REGULATORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. AS A MATTER OF POSITIVE FEDERAL STATUTORY LAW, AND AS RECOGNIZED BY THE SUPREME COURT, STRUCTURES BUILT AND MAINTAINED IN COMPLIANCE WITH THEIR GOVERNING OFFICIAL PERMITS CANNOT BE CONSIDERED UNLAWFUL OR UNREASONABLE 6

TABLE OF CONTENTS (continued)

Page

II. THE UNSUPPORTED CONCLUSION THAT THE POWER LINE CONSTITUTED AN "UNREASONABLE INTERFERENCE TO NAVIGATION" REPRESENTS AN UNTENABLE AND IMPROPER INTRUSION INTO THE PROVINCE OF FEDERAL REGULATORY AUTHORITIES AND DIRECTLY CONFLICTS WITH THE ADMIRALTY JURISPRUDENCE OF THIS HONORABLE COURT 14

III. THE COURTS BELOW COMMITTED LEGAL ERROR IN INTERPRETING AND APPLYING FEDERAL REQUIREMENTS AND STANDARDS 17

IV. THE LOWER COURTS STRAYED FROM THE LEGAL ANALYSIS MANDATED BY MARITIME LAW AND THUS COMMITTED A LEGAL ERROR THAT VIOLATES THE UNIFORMITY OF THE GENERAL MARITIME LAW 19

V. THE INTEREST OF UNIFORMITY IN THE ADMIRALTY AND MARITIME LAWS OF THE UNITED STATES WARRANTS REVIEW BY THIS HONORABLE COURT 24

CONCLUSION 25

Appendix

Section A

A Trial Court Judgment of March 21, 1989 ..... A-1

B Trial Court Reasons for Judgment of September 20, 1989 ..... A-3

C Order and Opinion of the Louisiana Court of Appeal for the Fifth Circuit, January 17, 1990 ..... A-6

D Denial of March 16, 1990 by the Louisiana Court of Appeal for the Fifth Circuit of Petitioner's Application for Rehearing A-15

E Denial by the Louisiana Supreme Court of Petitioner's Application for Writ of Certiorari, May 25, 1990 ..... A-16

F Trial Court Judgment of November 27, 1991 ..... A-18

Trial Court Reasons for Judgment of November 27, 1991 ..... A-21

Order and Opinion of the Louisiana Court of Appeal for the Fifth Circuit, May 12, 1993 ..... A-22

Denial by the Louisiana Supreme Court of Petitioner's Application for Writ of Certiorari, October 8, 1993 ..... A-43

Section B

Excerpts from Permit LMNOD-NP (Caminada Bay) of United States Army Corps of Engineers A-45

Drawing A-50

Section C

Pertinent Text of Federal Statutory and Regulatory Provisions A-51

TABLE OF AUTHORITIES

Cases **Page(s)**

American Telephone & Telegraph Co. v. Steuart Transportation Company, 1978 A.M.C. 1680 (D.Md. 1977) 13,15

Andrews v. United States, 801 F.2d 644 (3d Cir. 1986) 21

Bass v. Southern Bell Telephone and Telegraph Company, 113 F.Supp. 911 (W.D.Ken. 1953), *aff'd*, 217 F.2d 801 (6th Cir. 1954) 12

Blake v. United States, 181 F.Supp. 584 (E.D.Va. 1960), *aff'd*, 295 F.2d 91 (4th Cir. 1961) 15

Bludworth Construction Company v. Houston Lighting & Power Company, 1956 A.M.C. 1536 (S.D.Tex. 1956) 13

Bordelon v. T. L. James & Co., 380 So.2d 226 (La. App. 3d Cir. 1980) 16

Bourgeois v. Louisiana Power & Light Company, 556 So.2d 1292 (La. App. 5th Cir. 1990) (Civil Appeal No. 89-CA-0497), *writ den.*, 563 So.2d 877 (La. 1990) (No. 90-C-0798) 2

Bourgeois v. Louisiana Power & Light Company, 620 So.2d 306 (La. App. 5th Cir. 1993), *writ den.*,____ So.2d ____ (La. 1993) 2

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Branch v. Schumann, 445 F.2d 175 (5th Cir. 1971) 20

Continental Oil Company v. M.S. GLENVILLE, 210 F.Supp. 865, 870 (S.D.Tex. 1962) 21,22

Dudding v. Florida Keys Electrical Co-Operative Association, 105 So.2d 597 (Fla. App. 3d Dist. 1958) 13

Foremost Insurance Company v. Richardson, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982) 20,21

Frost v. Washington County R. Co., 96 Me. 76, 51 A. 806 (1901) 15

Garrett v. Moore-McCormack Company, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942) 20,21

George v. Gateway Barge Line, Inc., 295 So.2d 841, (La. App. 1st Cir. 1974) 16

Green v. Industrial Helicopters, Inc., 593 So.2d 634 (La. 1992) 21

Lakewood S.S. Co. v. Superior Water, Light & Power Co., 88 F.2d 895 (7th Cir. 1937) 13

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Landowski v. Grand Trunk Western Railroad Co., 822 F.2d 600 (6th Cir. 1987) 13

Lavergne v. The Western Company of North America, Inc., 371 So.2d 807 (La. 1979) 21

The LOTTAWANNA, 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1875) 20

Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 A. 953 (1905) 15

Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA, 527 F.Supp. 824, 831 (E.D.La. 1981), *aff'd*, 699 F.2d 240 (5th Cir. 1983), *reversed on other grounds*, 761 F.2d 229 (5th Cir. 1985) 13

Michigan Wisconsin Pipeline Company v. Williams McWilliams Company, 551 F.2d 945, 953 (5th Cir. 1977) 13

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) 20

Miller v. Mayor of New York, 109 U.S. 385, 3 S.Ct. 228, 27 L.Ed. 971 (1883) 15

Missouri Valley Bridge & Iron Co. v. Inland Waterways Corp., 9 F.Supp. 66 (E.D.La. 1934) 19

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435 (1910) 11

Moragne v. States Marine Lines Co., Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) 20,21

Nehus v. Alaska Marine Towing, Inc., 519 F.Supp. 328 (W.D.Wash. 1981) 5

Petition of Potomac Sand and Gravel Company, 253 F.Supp. 268 (D.Md. 1966) 13

Pillsbury Company v. Midland Enterprises, Inc., 715 F.Supp. 738 (E.D.La. 1989) 14

Southern Oyster Shell Milling Corporation v. Transcontinental Gas Pipe Line Corporation, 159 So.2d 542 (La. App. 1st Cir. 1963) 15

Southern Pacific Company v. Olympian Dredging Company, 260 U.S. 205, 43 S.Ct. 26, 67 L.Ed. 213 (1922) 9,15

State of Alabama v. National Marine Service, Inc., 434 F.Supp. 1097 (S.D.Ala. 1977) 13

Texas & P. Ry. Co. v. Angola Transfer Co., 18 F.2d 18 (5th Cir. 1927) 13

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Thompson v. Consolidated Gas Electric Light & Power Company of Baltimore, 111 F.Supp. 719 (D.Md. 1953) 12,15,22

United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940) 6,7,12

United States v. INLAND CHIEF and ASTORIA, 1954 A.M.C. 191, 194 (D.Or.) 12,13

In re Waterstand Marine, Ltd., 1991 A.M.C. 1784 (E.D.Pa. 1988), *aff'd w/o op.,* 862 F.2d 311 (3d Cir. 1988) 13,15,23

Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., Ltd., 259 F. 166 (4th Cir. 1919) 15

Wisconsin v. Illinois, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929) 12

Statutes

28 U.S.C. §1257 3

33 U.S.C. §§401 *et seq.* 8,9,21

33 U.S.C. §403 . . . . . i,3,7,8,12,14,17

33 U.S.C. §§2001 to 2038; 2071 to 2073 21

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Statutes (continued)

26 Stat. 454 9

27 Stat. 110 9

Regulations

33 C.F.R. Parts 320, 322 and 325 (1993) 3,21

33 C.F.R. §320.2(b) (1993) 3,8

33 C.F.R. §322.2(b) and (c) (1993) 3,18

33 C.F.R. §325.7(1993) 3,16,23

42 Fed. Reg. 37122, 37126 (July 19, 1977) 19

Miscellaneous Material

Note, *Green v. Industrial Helicopters, Inc.: Strict Custodial Liability Merges with the General Maritime Law,* 67 Tul.L.Rev. 541 (1992) 21

5 *U.S. Coast Pilot* 192 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOUISIANA POWER & LIGHT COMPANY

Petitioner

VERSUS

BARRY BOURGEOIS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petitioner, Louisiana Power & Light Company ("LP&L"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the courts below relative to this matter.

OPINIONS BELOW

In March of 1989, the district court granted a motion for summary judgment filed by LP&L and issued a judgment and reasons therefor. *Appendix*, pp. A-1, A-3 et seq. The respondent, Barry Bourgeois, appealed from that ruling. On January 17, 1990, the Louisiana Court of Appeal

for the Fifth Circuit reversed the trial court and remanded the case for further proceedings (*Appendix*, p. A-6); the court refused a rehearing (p. A-15). The Louisiana Supreme Court denied an application for a writ of certiorari by LP&L on May 25, 1990 (*Appendix*, p. A-16). The official citation for this aspect of the case is *Bourgeois v. Louisiana Power & Light Company*, 556 So.2d 1292 (La.App. 5th Cir. 1990), *writ den.*, 563 So.2d 877 (La. 1990).

Trial of this matter was conducted on September 4, 5, 6 and 27, 1991. Following the submission of post-trial memoranda, the district court issued a judgment and written reasons therefor on November 27, 1991. *Appendix*, pp. A-18 and A-21. The trial court found the plaintiff/respondent, Barry Bourgeois, to be 66 2/3% at fault, the defendant/petitioner LP&L to be 33 1/3% at fault, found total damages to be $650,236.00, and found LP&L liable for $216,745.33 (one third of the total), plus court costs (including expert witness fees) and legal interest.

LP&L filed a suspensive appeal of the judgment with the Louisiana Court of Appeal for the Fifth Circuit and posted the required security bond. Following briefing and oral argument, the appellate court issued an opinion on May 12, 1993 affirming the trial court judgment. *Appendix*, pp. A-27 et seq. On October 8, 1993, the Louisiana Supreme Court denied the petitioner's application for a writ of certiorari (*Appendix*, p. A-43). The case is officially reported as *Bourgeois v. Louisiana Power & Light Company*, 620 So.2d 306 (La.App. 5th Cir. 1993), *writ den.*, ____ So.2d ____ (La. 1993).

JURISDICTION

An application for a writ of certiorari for review of the decision of the Louisiana Court of Appeal for the Fifth Circuit was submitted by petitioner to the Louisiana Supreme Court; the application was denied on October 8, 1993, rendering the judgment final (*Appendix*, p. A-43). This petition for certiorari is being filed within the prescribed period of ninety (90) days after October 8, 1993. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This case involves Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) (hereinafter the "Act"), as well as regulations under the Act set forth in 33 C.F.R. Parts 320, 322 and 325 (1993), specifically: 33 C.F.R. § 320.2(b) (1993); 33 C.F.R. §322.2(b) and (c); and 33 C.F.R. §325.7 (1993). These authorities are reprinted in pertinent part in the *Appendix*, at pp. A-51 *et seq.*

STATEMENT OF THE CASE

The petitioner, Louisiana Power & Light Company, is the owner of a federally regulated and permitted "obstruction" to vessel navigation: an overhead power line crossing Caminada Pass (in the area of Grand Isle, Louisiana) on the Louisiana Gulf Coast. LP&L was sued by the respondent, Barry Bourgeois, for damages allegedly sustained as the result of an allision between Bourgeois' shrimp boat and the LP&L line.

Bourgeois and his deck hand, Carlton Dean Santiny, anchored their vessel, the F/V CAPT. BARRY, within 15 feet of the LP&L power line crossing at Caminada Pass, near Grand Isle, Louisiana during the night of May 9, 1988. Both men went to sleep. During the night, the vessel turned on her anchor line with the changing tide, so that when the men awoke the next morning, they were on the inland side of the power line crossing.

Concluding that he had no way out other than to pass beneath the power line, Bourgeois stationed Santiny at the bow of the vessel as a lookout. Bourgeois could not see the power line from his position inside the cabin of the vessel. He started the engines of the vessel and, as Santiny pulled on the anchor line with the engines in neutral, the vessel proceeded toward the power line.

Bourgeois had no recollection of what occurred from the time that he told Santiny to look up at the power line as the vessel's antenna drew to within a foot of the line. In fact, an electric charge from the line passed through the CAPT. BARRY's VHF antenna to the radio in the cabin, causing an explosion and fire that resulted in injuries to the respondent.

The LP&L power line was constructed in 1969 and 1970 pursuant to an official permit issued by the United States Army Corps of Engineers. The line's required clearance above Mean Sea Level is 38 feet (*Appendix*, pp. A-45 to A-50). Official navigational charts depict the line and represent the authorized clearance as 37 feet (above mean high water). The line is the highest of four obstructions in the immediate area of Caminada Pass; the

minimum clearance in this area of the Pass is 14 feet (above mean high water). *See also*, 5 *U.S. Coast Pilot* 192 (National Oceanic and Atmospheric Administration, Twentieth Ed. 1987), wherein the Pass is described as follows:

> Caminada Pass, about 7 miles SW of Barataria Bay, connects Caminada Bay with the Gulf. The pass is little used, as every storm shifts the entrance channel. Usually a depth of 4 to 5 feet can be taken into the pass, but only 2 or 3 feet into the bay. A private light marks the jetty on the N side of the entrance. Just inside the pass, an old highway bridge with its midsection removed is used as fishing piers. A fixed highway bridge on the NE side of the fishing piers has a clearance of 14 feet for a channel width of 30 feet. An overhead power cable crossing at the bridge has a clearance of 23 feet. Another overhead power cable about 0.3 miles SW of the bridge has a clearance of 37 feet. The tidal current in Caminada Pass averages 1.5 knots with higher speeds reported. Several wrecks are in the vicinity of the pass. The pass is not recommended for strangers.[1]

The Federal questions here presented were specifically raised throughout the course of this case. These issues were addressed by the district and appellate courts in connection with petitioner's motion for summary judgment (*Appendix*, pp. A-1 through A-17). Additionally, the same issues were asserted in connection with the trial and the principal appeal on the merits (*Appendix*, pp. A-18 through

---

[1] Excerpts from the Coast Pilot (including the cited passage) were admitted into evidence. Coast Pilot volumes are official aids to navigation and are subject to judicial notice. *Nehus v. Alaska Marine Towing, Inc.*, 519 F.Supp. 328 (W.D. Wash. 1981).

A-44). Petitioner's Federal claims and defenses were thus presented seasonably and renewed at each stage of the proceedings below.

REASONS FOR GRANTING THE WRIT

I. AS A MATTER OF POSITIVE FEDERAL STATUTORY LAW, AND AS RECOGNIZED BY THE SUPREME COURT, STRUCTURES BUILT AND MAINTAINED IN COMPLIANCE WITH THEIR GOVERNING OFFICIAL PERMITS CANNOT BE CONSIDERED UNLAWFUL OR UNREASONABLE.

Regulation of "obstructions" in or upon the navigable waters of the United States is constitutionally and statutorily vested in the federal government. This plenary power has been recognized for well over one hundred years. *See, e.g., United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940) (and cases cited therein).

The courts below wrongfully disregarded substantive principles of general maritime law in concluding that petitioner was at fault (albeit partially) for the subject accident. As a matter of Federal admiralty law, no evidence of fault on the part of LP&L exists; thus, no basis exists for the imposition of fault against LP&L.

LP&L owned and maintained a lawful structure under positive federal statutory law *and* under the general maritime law. The decisions of the trial and appellate courts stand in direct conflict with positive, binding

authority and raise a jurisprudential conflict in both admiralty and Louisiana law. These rulings also represent a radical departure from established maritime law and do violence to the uniformity of admiralty law. LP&L aplies for a writ of certiorari upon the grounds that a finding of fault against it represents blatant legal error through an incorrect construction of Federal statutory and regulatory authorities which violates the uniformity of the admiralty law.

The Louisiana Fifth Circuit Court of Appeal correctly found that the case is governed by the "substantive law of admiralty." In fact, the court freely acknowledged that the United States possesses the power to control the erection of structures over navigable waters (citing *United States v. Appalachian Electric Power Company, supra*). The appellate court's next step, however, defies logic. The pertinent (and most incongruous) portion of the court's opinion appears as follows:

> [W]e take note of the jurisprudence which indicates that a structure for which an Army Corps of Engineers' permit has been issued is sanctioned as a structure lawful under 33 U.S.C. 403. [Citations]. Compliance with this statute, alone, does not end the inquiry; rather, we must consider the totality of the circumstances to determine whether LP&L nevertheless violated its permit.

Appendix, p. A-37.

The "jurisprudence" described by the court constitutes the "substantive law of the admiralty" - the

general maritime law. *No* authority was cited by the appellate court to support inquiry of the "totality of the circumstances" or for going beyond considerations of permit compliance. Rather, the state courts below cast aside the very authorities they recognized as binding.

The Rivers and Harbors Act of 1899 (33 U.S.C. §§401 *et seq.*) (the "Act") sets forth the law regarding the construction and maintenance of obstructions to marine navigation. As the Act now operates, and pursuant to its subsidiary regulations, these structures must be permitted by United States Army Corps of Engineers so as not to constitute unreasonable obstructions to navigation.

Admiralty jurisprudence and statutory law firmly establish the legality and reasonableness of officially permitted structures in navigable waterways. Section 10 of the Act (33 U.S.C. §403) is clear and direct. The concomitant regulations further explain the permitting process. 33 C.F.R. §320.2(b) (1993) describes the statute:

> (b) Section 10 of the Rivers and Harbors Act approved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the

> work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. . . .

In the important case of *Southern Pacific Company v. Olympian Dredging Company*, 260 U.S. 205, 43 S.Ct. 26, 67 L.Ed. 213 (1922), this Court recognized the true nature and scope of the statutory scheme in commenting upon §7 of the Act of September 19, 1890 (26 Stat. 454), as amended by §3 of the Act of July 13, 1892 (27 Stat. 110) *inter alia*, the predecessors of the Rivers and Harbors Act of 1899 (33 U.S.C. §§401 *et seq.*):

> By the Act of September 19, 1890, 26 Stat. 453-454, Congress inaugurated a new policy of general, direct control over the navigable waters of the United States. The act provided for the alteration of existing bridges which interfered with free navigation (§§4 and 5); prohibited the dumping of waste material in such waters so as to obstruct navigation (§6); made it unlawful to build wharves, piers, and other structures named, without the permission of the Secretary of War, in such manner as to obstruct or impair navigation; or to commence the construction of any bridge over any such waters under any act of a state legislature until the location and plans therefor had been submitted to and approved by the Secretary of War; or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable water of the United States, unless ap-

proved and authorized by the Secretary of War (§7). The amendment of 1892 did not alter §7 in any respect material to this inquiry.

By this legislation Congress assumed jurisdiction of the subject of obstructions to navigation and committed to the Secretary of War administrative power in so far as administration was necessary. Under §7, it was not enough for the California Pacific Railroad Company to secure the authority of the California legislature to build the new bridge; it was necessary in addition to have the location and plans approved by the Secretary of War before the bridge could be lawfully constructed. That the Secretary of War was authorized to impose the condition heretofore quoted does not admit of doubt. The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval. *In light of this general assumption by Congress of control over the subject and of the large powers delegated to the Secretary, the condition imposed by that officer cannot be considered otherwise than as an authoritative determination of what was reasonably necessary to be done to insure free and safe navigation so far as the obstruction in question was concerned.*

* * *

Whether the limitation in this respect [the requirements of the permit under review] was grounded alone upon what the Secretary considered would be sufficient to secure the safety of

navigation, or upon the fact that to leave the stumps in the bed of the river would be of some positive service in stabilizing the shifting bed of the stream, or useful in some other way, does not appear. *It was not for the petitioners, however, to question either his reasons or his conclusions. They were justified in proceeding upon the assumption that what the Secretary, in the exercise of his lawful powers, declared to be no obstruction to navigation was in fact no obstruction.* The language which this Court employed in *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 195, is pertinent:

'. . . Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that Executive officers conform their action to the mode prescribed by Congress.'

Id, 260 U.S. at 207-210 (emphasis added).

The Court concluded that the bridge owner's compliance with the requirements set forth by the Secretary of

War in dismantling an old bridge structure precluded any allegation of actionable negligence against the bridge owner for damages sustained by a dredge that was holed by a remnant of the bridge twenty-three years after the demolition.

The Court directly addressed Section 10 of the Act (33 U.S.C. §403) seven years later in the case of *Wisconsin v. Illinois*, 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929). *Again*, this Court recognized the judicial deference to be accorded to official permits. The clauses of Section 10 under review in *Wisconsin* were the statutory basis for the delegation of the authority to permit particular obstructions to navigation (including electric power lines) to the Secretary of War (now the Secretary of the Army, acting through the United States Army Corps of Engineers). The court noted in the *Wisconsin* opinion that the delegation by Congress of the navigational review function was proper since the Secretary held the particular expertise necessary to exercise the administrative function. *Id.*, 278 U.S. at 414. *See also, United States v. Appalachian Electric Power Co., supra.*

The foregoing serves as the foundation for the rule repeatedly enforced by admiralty courts for at least a hundred years: *structures built and maintained in compliance with their governing official permits cannot be considered unlawful or unreasonable.*[2]

---

[2] Examples of application of the rule in the context of overhead wire structures are: *Bass v. Southern Bell Telephone & Telegraph Company*, 113 F.Supp. 911, 915 (W.D.Ken. 1953), *aff'd* 217 F.2d 801 (6th Cir. 1954); *Thompson v. Consolidated Gas Electric Light & Power Company of Baltimore*, 111 F.Supp. 719 (D.Md. 1953); *United States v. INLAND*

For instance, in *Thompson v. Consolidated Gas Electric Light & Power Company of Baltimore,* 111 F.Supp. 719 (D.Md. 1953), the mast of the plaintiff's yacht came into contact with an overhead electric line, causing the vessel to receive a damaging electrical discharge. The district court held the plaintiff solely at fault for the incident and dismissed his claims against the defendants. The court held that the cable crossing was a lawful structure under its governing official permit and that the plaintiff's negligent navigation was the sole cause of the allision. The court charged the plaintiff with full knowledge of the charted clearance of the cable above the water and found fault for the plaintiff's lack of knowledge concerning the actual height of his vessel. Furthermore, the plaintiff was

---

(footnote 2 continued)

CHIEF and ASTORIA, 1954 A.M.C. 191 (D.Or); *Bludworth Construction Company v. Houston Lighting & Power Company,* 1956 A.M.C. 1536 (S.D.Tex. 1956); *Dudding v. Florida Keys Electrical Co-Operative Association,* 105 So.2d 597 (Fla. App. 3d Dist. 1958) (judgment N.O.V.); and *In re Waterstand Marine,* 1991 A.M.C. 1784 (E.D.Pa. 1988), *aff'd w.o.op.,* 862 F.2d 311 (3d Cir. 1988). Maritime cases involving different structures include: *Marathon Pipe Line Co. v. Drilling Rig ROWAN/ODESSA,* 527 F.Supp. 824, 831 (E.D.La. 1981), *aff'd.,* 699 F.2d 240 (5th Cir. 1983) *reversed on other grounds,* 761 F.2d 229 (5th Cir. 1985) ("Inasmuch as Marathon's pipeline was properly laid, in accordance with required permits, Marathon is not guilty of any fault or neglect which contributed to the damage sustained by the pipeline."); *Michigan Wisconsin Pipeline Company v. Williams McWilliams Company,* 551 F.2d 945, 953 (5th Cir. 1977) (submerged pipeline); *Texas & P Ry. Co. v. Angola Transfer Co.,* 18 F.2d 18 (5th Cir. 1927) (bridge); *Landowski v. Grand Trunk Western Railroad Co.,* 822 F.2d 600 (6th Cir. 1987) (bridge); *Lakewood S.S. Co. v. Superior Water, Light & Power Co.,* 88 F.2d 895 (7th Cir. 1937) (submerged water pipe and electrical cable); *Petition of Potomac Sand and Gravel Company,* 253 F.Supp 268 (D.Md. 1966) (submerged cable); *State of Alabama v. National Marine Service, Inc.,* 434 F.Supp. 1097 (S.D. Ala. 1977) (bridge); *American Telephone & Telegraph Co. v. Steuart Transportation Company,* 1978 A.M.C. 1680 (D.Md. 1977) (submerged coaxial cables).

held to be at fault for failing to observe the clearance of the vessel beneath the line and for the lack of any particular inquiry as to the tide in the waterway at the time.

The continued viability of these principles cannot be disputed. In *Pillsbury Company v. Midland Enterprises, Inc.*, 715 F.Supp. 738 (E.D.La. 1989), one of the more recent cases under the Act, the District Judge explicitly recognized the conclusive impact of the permitting process, stating, "Certainly, under the express terms of the statute [33 U.S.C. §403] and the Corps regulations thereunder, a structure for which a Corps permit has been issued is sanctioned as a structure lawful under the statute." *Id* at 761.

There can be no doubt that the state courts below committed grave error. *As a matter of law,* permit compliance vitiates claims of actionable negligence. The lower courts inexplicably abandoned this positive and established legal principle.

II. THE UNSUPPORTED CONCLUSION THAT THE POWER LINE CONSTITUTED AN "UNREASONABLE INTERFERENCE TO NAVIGATION" REPRESENTS AN UNTENABLE AND IMPROPER INTRUSION INTO THE PROVINCE OF FEDERAL REGULATORY AUTHORITIES AND DIRECTLY CONFLICTS WITH THE ADMIRALTY JURISPRUDENCE OF THIS HONORABLE COURT.

The determination of what does or does not constitute a reasonable obstruction to navigation rests solely

with the Secretary of the Army (through the Corps of Engineers). The judiciary cannot review that determination outside of the administrative process. *See, e.g., Southern Pacific Company v. Olympian Dredging Company, supra; Blake v. United States,* 181 F.Supp. 584 (E.D.Va. 1960), *aff'd,* 295 F.2d 91 (4th Cir. 1961); *Thompson v. Consolidated Gas Electric & Power Company of Baltimore,* 111 F.Supp. 719 (D.Md. 1953); *American Telephone & Telegraph Co. v. Steuart Transportation Co.,* 1978 A.M.C. 1680, 1694 (D.Md. 1977); *Southern Oyster Shell Milling Corporation v. Transcontinental Gas Pipe Line Corporation,* 159 So.2d 542 (La. App. 1st Cir. 1963). [3] In *In re Waterstand Marine, Ltd.,* 1991 A.M.C. 1784 (E.D.Pa. 1988), *aff'd w/o op.,* 862 F.2d 311 (3d Cir. 1988),the district court held that the vessel interests could not attack the placement and use of an electric power line (which, by the way, complied with its Corps of Engineers permit) through a collateral attack on the validity of the permit since the vessel interests had not exhausted the administrative remedies for permit review as established in the Corps regulations.

Until the instant case, Louisiana law was in accord. In *Southern Oyster Shell Milling Corporation v. Transcontinental Gas Pipe Line Corporation,* 159 So.2d 542 (La.App.1st Cir. 1963), the court plainly recognized the significance of a Corps permit:

An injunction will not lie to restrain or abate the

---

[3] In addition to these authorities, *see, Miller v. Mayor of New York,* 109 U.S. 385, 3 S.Ct. 228, 27 L.Ed. 971 (1883), *Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., Ltd.,* 259 F.166 (4th Cir. 1919); *Maine Water Co. v. Knickerbocker Steam Towage Co.,* 99 Me. 473, 59 A. 953 (1905); and *Frost v. Washington County R. Co.,* 96 Me. 76, 51 A. 806 (1901).

> subsequent maintenance and operation of a lawful structure in navigable waters as a nuisance or as an obstruction to navigation, provided said line was laid and is being operated in accordance with the plans approved by the Corps of Engineers. If the pipeline was laid according to the approval of the Corps of Engineers as the permission in this case shows, and such permission has no concept of having been arbitrarily issued, the Court is without authority to inquire into the propriety of the granting of such order.
>
> In our opinion the pipeline was laid in accordance with the plans specified by the Corps of Engineers, who, by Congress, were delegated the right to grant such permission. Accordingly, this Court has no authority to substitute its opinion for the discretion vested in the Corps of Engineers unless same can be categorized as arbitrary, which is in no way contended here.

Id at 544. *Compare, George v. Gateway Barge Line, Inc.*, 295 So.2d 841, 842-843 (La.App.1st Cir. 1974) and *Bordelon v. T. L. James & Co.*, 380 So.2d 226, 228-229 (La.App.3d Cir. 1980).

Section (f) of the LP&L permit for the line (*Appendix* at p. A-48) provides for administrative review of the permit and the structure. Corps of Engineers regulations reinforce this provision. *See* 33 C.F.R. §325.7 (1993) (the source authority dates from 1986). No such action has ever been taken with regard to this power line.

The conclusion of the lower courts in the instant case

that a court of law stands free to analyze the reasonableness of a structure in terms of the "totality of the circumstances" despite permit compliance directly contradicts the established law of admiralty (including the Federal statutory and regulatory permitting scheme). The two positions are mutually repugnant.

III. THE COURTS BELOW COMMITTED LEGAL ERROR IN INTERPRETING AND APPLYING FEDERAL REQUIREMENTS AND STANDARDS.

The lower courts interpreted Section "c" of the permit in reaching the conclusion that LP&L violated the permit because the LP&L line was an "unreasonable obstruction to navigation." Assuming that provisions of the permit could be subject to such interpretation and review, the conclusion represents manifest legal error.

Section "c" of the permit states (with emphasis added): "That there shall be no unreasonable interference with navigation *by the work herein authorized.*" *Appendix*, p. A-47. As the trial record establishes, a *work* is not a *structure*. Section 10 of the Act (33 U.S.C. Sec. 403) distinguishes the two terms (with emphasis added):

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures* in any port, roadstead, haven, harbor, canal, navigable river, or other water of the

> United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the *work* has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The Code of Federal Regulations, at 33 C.F.R. §322.2(b) and (c) (1993), defines the terms as they specifically relate to Corps of Engineers permits:

> (b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, *power transmission line,* permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.
>
> (c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(Emphasis added).

Although these definitions were not formally included in the regulatory format until 1977, they certainly reflect the Corps' long-standing approach to these matters: "We have adopted administrative definitions of the terms 'structure' and 'work' to identify the types of activities that will require Section 10 permits." 42 F.R. 37122, 37126 (July 19, 1977).

Obviously, Section "c" of the LP&L permit makes no reference to "structures," although other portions of the permit include the term. A "power transmission line" is affirmatively defined as a "structure." As the record establishes, Section "c" relates to "work" - construction activity - and means that during construction of the structure, there will be no unreasonable obstruction to navigation. *Compare, Missouri Valley Bridge & Iron Co. v. Inland Waterways Corp.*, 9 F.Supp. 66 (E.D.La. 1934). This standard provision also carries special significance for dredging and fill activity, as the definition indicates. Certainly, the permit provision is not subject to interpretation in the manner adopted by the courts below.

IV. THE LOWER COURTS STRAYED FROM THE LEGAL ANALYSIS MANDATED BY MARITIME LAW AND THUS COMMITTED A LEGAL ERROR THAT VIOLATES THE UNIFORMITY OF THE GENERAL MARITIME LAW.

Admiralty law is complete in and of itself in its treatment of collision or allision liability. Cases of allision are evaluated under maritime law upon review of the mariner's navigational fault and the fault of the owner of the struc-

ture involved (as determined by compliance *vel non* with permitting procedure and requirements). Concepts of duty-risk (the approach that includes the "totality of the circumstances analysis) or other doctrines of land-based tort law are foreign to this analysis. Furthermore, the law does not permit gloss upon the general maritime law to the extent that, as a consequence, maritime interests are burdened with additional or higher standards of care. "Any such supplementation necessarily entails alteration of an admiralty norm in direct contravention of the quest for uniformity and the *Supreme Court's mandate* that the defendant's conduct be measured by maritime standards." *Branch v. Schumann,* 445 F.2d 175, 178 (5th Cir. 1971) (emphasis added).

Supplementation of maritime law in the manner adopted by the courts below is counter to the overriding concern for uniformity in the general maritime law. The constitutionally based notion that admiralty law must be "a system of law coextensive with, and operating uniformly in, the whole country" underlies the full breadth of marine jurisprudence. *The LOTTAWANNA,* 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1875). *See, e.g., Moragne v. States Marine Lines Co., Inc.,* 398 U.S. 177, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970); and *Garrett v. Moore-McCormack Company,* 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 2d 239 (1942)[4]. The particular subject of collision is no exception. *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed. 2d 300 (1982).

---

[4] The concern for uniformity was recently reiterated by the United States Supreme Court in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).

The Louisiana Supreme Court recently stated that "a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law." *Green v. Industrial Helicopters, Inc.*, 593 So.2d 634, 639 (La. 1992). This case presents the very circumstances noted in *Green.* The federal legislation is the Rivers and Harbors Act of 1899 and its supporting regulations. 33 U.S.C. §§401 *et seq.*; 33 C.F.R. Parts 320, 322 and 325 (1993). The "clearly applicable rule" is represented by the numerous maritime authorities referenced in this petition. Note, *Green v. Industrial Helicopters, Inc.: Strict Custodial Liability Merges with the General Maritime Law,* 67 Tul.L.Rev. 541 (1992).

No one involved in this case (including the respondent, the petitioner, the district court and two appellate court panels) disputes that this case sounds in admiralty. Substantive admiralty principles govern the disposition of the case regardless of the forum; state law or state procedures cannot oust substantive rights conferred by admiralty. *Moragne v. States Marine Lines Co., Inc., supra; Garrett v. Moore-McCormack Co., supra; Lavergne v. The Western Company of North America, Inc.*, 371 So.2d 807 (La. 1979). Specific navigational rules apply to all vessels regardless of their commercial or non-commercial nature, and Bourgeois, as the operator of the F/V CAPT. BARRY, was obligated to observe these "Rules of the Road." LP&L was legally entitled to expect as much from Mr. Bourgeois. 33 U.S.C. §§2001 to 2038; 2071 to 2073; *Foremost Insurance Company v. Richardson, supra; Andrews v. United States,* 801 F.2d 644 (3d Cir. 1986); *Continental Oil Co. v.*

M.S. Glenville, 210 F.Supp. 865, 870 (S.D. Tex. 1962); *Thompson v. Consolidated Gas Electric Light & Power Co., supra.* This is all markedly different from the land-based standards of state law. In addition, substantive maritime law prescribes the application of specific burdens and presumptions in dealing with questions of navigational fault that have no counterparts in general tort law.

The distinction in the approach is wholly consistent with the navigational responsibilities imposed upon a vessel operator, who is held to a much higher legal standard than the land-based "reasonable man." This is not a case that involves a child, a pedestrian, a crane operator or a man erecting a television antenna in his backyard. This is the case of a vessel operator presumed and required by law to possess the knowledge necessary to allow him to navigate safely in the Caminada Pass area (including knowledge as to clearances of permitted obstructions in his path and knowledge of the height of his vessel). Bourgeois lacked that knowledge on May 10, 1988.

Neither the respondent nor the courts below established what height criteria should apply to the exclusion of the permit requirements. How high is high enough? Is LP&L to be required to somehow raise the line (assuming such is even feasible) to 50 feet for a 49 foot high vessel - or should the requirement be 100 feet for a 99 foot high vessel? The logic employed by the plaintiff and the courts below would so demand, *even though* LP&L fully complied with the requirements established by the Corps - the statutorily appointed permitting authority. This is all particularly troubling in view of the otherwise restricted navigability of Caminada Pass.

If the official permit is to be disregarded, and if the conclusion of the governing authority is to be ignored, how high is high enough? The ramifications of the introduction of such subjective analyses upon the uniformity of admiralty law are obvious; if uniformity in the admiralty law of allision is to exist, the federal authorities cannot be disregarded. The decision below is, in effect, a condemnation of the petitioner's line without the mandated administrative review. 33 C.F.R. §325.7 (1993); *In re Waterstand Marine, Ltd.*, 1991 A.M.C. 1784 (E.D.Pa. 1988), *aff'd w/o op.*, 862 F.2d 311 (3d Cir. 1988). Moreover, the decision rests upon subjective analyses by the courts below; none of the objective criteria set forth for the administrative review were addressed. *Supra.* The owners of permitted obstructions along or across the navigable waters of Louisiana no longer have the "luxury" of their counterparts in other states of being able to regard the Corps of Engineers permit as the official sanction for their structures; rather they must engage in some amorphic analysis with undefined parameters. How high is high enough? No answer exists in Louisiana if this decision is allowed to stand.

The Act and its supporting regulations set forth *the* standard for the evaluation of fault (or lack thereof) of owners of fixed structures involved in marine allisions. The law does not merely set forth minimum standards that states might choose to supplement by imposing stricter state-specific burdens on maritime interests; maritime law sets forth *the* standards. It is beyond the province of a "common" law court sitting in admiralty to supplement the established maritime law in this realm. The lower courts thus committed legal error in digressing from the positive maritime law and assigning fault to LP&L.

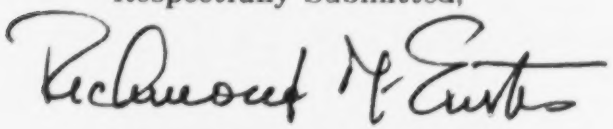
V. THE INTEREST OF UNIFORMITY IN THE ADMIRALTY AND MARITIME LAWS OF THE UNITED STATES WARRANTS REVIEW BY THIS HONORABLE COURT.

Although the points and authorities raised herein by LP&L are firmly established as a matter of maritime law, it appears that this Honorable Court has not been presented with the opportunity to review a case of maritime allision under the circumstances presented by this case. The pressing interests of certainty and uniformity in legal precedent (including the prospect of an unresolved conflict in the general maritime law if this decision is allowed to stand) provide a solid foundation for review by this Honorable Court. A line that is proper in one state must be proper in another. There cannot be more than one standard.

CONCLUSION

The lower courts committed manifest legal error in entering judgment against LP&L. Binding principles of maritime law fully establish LP&L's freedom from fault. The petitioner, Louisiana Power & Light Company, respectfully asks that this Court accept this matter for review and address the actions taken by the Louisiana state courts. Established principles of admiralty law have been wrongfully distorted as a result of the actions of the lower courts. The ramifications of the legal error are significant; action must be taken at this juncture to remedy the situation by upholding and enforcing the mandated legal standards.

Respectfully Submitted,



EUGENE G. TAGGART
RICHMOND M. EUSTIS*
CHARLES A. NUNMAKER
Monroe & Lemann
201 St. Charles Avenue
Suite 3300
New Orleans, LA 70170
(504) 586-1900

ATTORNEYS FOR PETITIONER
LOUISIANA POWER & LIGHT COMPANY

* Counsel of Record

APPENDIX, SECTION A

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 368-328 DIVISION "N" DOCKET NO.

BARRY BOURGEOIS

VERSUS

LOUISIANA POWER & LIGHT COMPANY

FILED: _____ _____
DEPUTY CLERK

FILED
MAR 21 1989

JUDGMENT

This cause came on for hearing on March 17, 1989, on a Motion for Summary Judgment filed on the behalf of the defendant, Louisiana Power & Light Company:

PRESENT:

Ivan David Warner, III, Attorney for Plaintiff

Richmond M. Eustis and Charles A. Nunmaker, Attorneys for Defendant.

After hearing the pleadings, evidence and arguments of counsel, the court considering the law and the evidence to be in favor of the defendant as a matter of law,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor the defendant, Louisiana Power & Light Company, and against the plaintiff, Barry Bourgeois, dismissing this action at Plaintiff's costs.

Gretna, Louisiana, this 21st day of March, 1989.

James L. Cannella

DISTRICT JUDGE

Respectfully submitted,

MONORE & LEMANN

/s/ Charles A. Nunmaker

Eugene G. Taggart
Richmond M. Eustis - #5388
Charles A. Nunmaker - #1510
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70170-3300
(504) 586-1900

Attorneys for Louisiana Power
& Light Company

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. #368-328 DIVISION "N"

BARRY BOURGEOIS

VERSUS

LOUISIANA POWER & LIGHT COMPANY

FILED: September 20th, 1989 /s/ Illegible
DEPUTY CLERK

FILED
AUG 13 '91

REASONS FOR JUDGMENT

STATEMENT OF THE CASE:

Plaintiff, Barry Bourgeois, filed suit against defendant, Louisiana Power and Light Company, for injuries sustained when his vessel, the F/V CAPT. BARRY, came in contact with an LP&L powerline. A motion for Summary Judgment was filed by LP&L on March 10, 1989, heard and granted on March 17, 1989 and signed on March 21, 1989.

FINDINGS OF FACT:

On May 9, 1988 Barry Bourgeois and his companion, Carleton Dean Santiny, set out on an overnight shrimping trip aboard the F/V CAPT. BARRY. The vessel and its 2-member crew navigated around the eastern tip of Grand Isle to Caminada Pass to avoid passing under the Louisiana Highway Bridge and a low LP&L powerline. They began their shrimping operations and concluded at approximately 1:00 a.m. on May 10, 1988. They set anchor approximately 15 feet on the gulf side of the powerline in question and played out approximately 120 feet of anchor line.

The plaintiff was aware that the vessel may be brought beneath the powerline during the night by the changing tide. In fact, this is what happened when the crew members were asleep. No lookout was maintained during the night.

In the morning the plaintiff decided to navigate back beneath the power line into the open water. On the previous night he had posted Santiny on the front of the vesel to check the clearance of his boat antenna as they proceeded beneath the line. However, at approximately 8:30 a.m. on May 10, 1988, the antenna came in contact with the power line sending an electrical charge through the antenna to the gear in the cabin causing plaintiff's injuries.

The approximate height o f the plaintiff's vessel with the antenna is 39 feet. The minimum required clearance above means sea level for the LP&L power line in question is 38 feet with an authorized clearance of 37 feet. The plaintiff did not refer to any navigational charts to determine

the clearance.

CONCLUSIONS OF LAW:

For Summary Judgment to be granted, the mover must prove that no question of material fact exists. LP&L has carried this burden. The applicable law which governs this case is the general maritime law of the United States. Through the "Saving to Suitors Clause" this litigant properly has the right to institute his lawsuit in state court *in personam* and apply maritime law. Since vessel allisions with overhead obstructions are within admiralty and maritime law, maritime law controls.

Under maritime law there is a presumption of fault against a moving vessel which strikes a stationary object. To escape total liability the vessel must show that it was without fault in the accident or that the allision was as a result of an inevitable accident. Neither of these two defenses were established. By his own admission the plaintiff also breached the statutory mandated duty of lookout and failed to maintain or refer to current navigational charts.

GRETNA, LOUISIANA, THIS 20th DAY OF SEPTEMBER, 1989.

/s/ James L. Cannella

JAMES L. CANNELLA,
JUDGE - DIV. "N"

BARRY BOURGEOIS	FIFTH CIRCUIT
VERSUS	COURT OF APPEAL
LOUISIANA POWER & LIGHT COMPANY	STATE OF LOUISIANA

NO. 89-CA-497

APPEAL FROM THE
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
DIVISION "N", NO. 368-328
THE HONORABLE JAMES L. CANNELLA, JUDGE

SOL GOTHARD
JUDGE

JAN 17 1990

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin, and Sol Gothard.)

IVAN DAVID WARNER, III
CLYDA A. RAMIREZ
PATRICIA D. MISKEWICZ
BYRON P. GUILLORY
409 S. Broad Street
New Orleans, Louisiana 70119
Attorneys for Plaintiff/Appellant

EUGENE G. TAGGART
RICHMOND M. EUSTIS
CHARLES A. NUNMAKER
201 St. Charles Avenue
33rd Floor
New Orleans, Louisiana 71017-3300
Attorneys for Defendant/Appellee

REVERSED AND REMANDED

Plaintiff, Barry Bourgeois, appeals the trial court judgment which granted defendant Louisiana Power and Light's (LP&L) motion for summary judgment and dismissed plaintiff's suit. We reverse.

The facts as presented by depositions introduced into the record are undisputed. Barry Bourgeois, captain of the commercial fishing vessel, Captain Barry, and deckhand Carlton Santiny set out from the bay side of Grand Isle in the afternoon of May 9, 1988 to shrimp. They navigated east, around the Gulf side of Grand Isle and proceeded to Caminada Pass. It was necessary for the Captain Barry to take the longer route around because the clearance between the water and a fixed bridge at the west end of the island on Louisiana Highway 1 would not permit safe passage for the vessel. An aerial power line maintained by LP&L crossed the mouth of Caminada Pass on the gulf side of the bridge.

When they arrived at the Pass, about 6:00 p.m., the two men laid anchor on the gulf side of the power line and waited for nightfall to begin shrimping operations. They shrimped until about midnight. Because the power line was also the demarcation used by the Wildlife and Fisheries for the division of open shrimping areas, the Captain Barry was anchored about fifteen feet from the line for the night. When anchor was set the tide was receeding, moving the vessel away from the line. However, while the crew slept, the tide changed and the vessel drifted the extent of the anchor rope bringing the vessel under the line. When the men awoke at about 8:00 a.m. they discovered they were on the bay side of the power line at rising tide.

Plaintiff started the motor and navigated the Captain Barry back out toward the Gulf. The antenna on top of the mast of the Captain Barry either came in contact with or got close enough to the line to receive an arc of electricity which sent high voltage to ground through the vessel's radio causing an explosion and fire in the cabin of the Captain Barry. Plaintiff, who was at the helm, was seriously injured.

LP&L filed a motion for summary judgment asserting that, even accepting the facts as presented by the plaintiff, the cause of the accident was solely the fault of the plaintiff as a matter of law. The trial court granted the motion in a decision which is the basis of this appeal.

A motion for summary judgment should be granted only if the pleadings, depositions, answer to interrogatories and admissions on file and affidavits show there is no genuine issue of matter fact to be decided and mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966; *Kerwin v. Nu-Way Const. Service, Inc.*, 451 So.2d 1193 (La.App. 5th Cir. 1984), writ den. 457 So.2d 11 (La.1984). In support of its motion LP&L relies on principles of admiralty law which state that a moving vessel which strikes a stationary object is at fault. In order to rebutt the presumption the vessel must prove either that it was without fault or that the allision was occasioned by an inevitable accident.

We agree with LP&L's assertion that this case is within admiralty jurisdiction. Such jurisdiction is proper when a tort occurs on the high seas or on navigable waters and the plaintiff can show that the wrong "bears a signifi-

cant relationship to traditional maritime activity." *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 269, 93 S.Ct. 493, 504 (1972); *Bulba v. Bradshaw,* 795 F.2d 349 (4th Cir.1986); *La Montagne v. Craig,* 817 F.2d 556 (9th Cir.1987). In the instant case, the accident occurred at the mouth of Caminada Bay, a navigable waterway, while plaintiff was engaged in commercial shrimping activity. Thus, both the situs and nexus requirements for admiralty jurisdiction are met.

Although original jurisdiction over all cases in maritime and admiralty vests in federal courts, the "saving to suitors clause" reserves to litigants "in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. 1333. Thus, a plaintiff may properly bring a personal injury action in state court. As a general rule the substantive law of admiralty governs in actions brought in state courts. As explained by the Supreme Court in *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485 at 2494 (1986);

> "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Under principles of federal maritime law a vessel which drifts into collision is presumed to be at fault. *James v. River Parishes Co., Inc.,* 686 F.2d 1129 (5th Cir.1982). That presumption is a prima facie showing of negligence on

the part of the moving vessel. *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir.1967). That presumption may be rebutted by the moving vessel by a preponderance of the evidence. *James v. River Parish Co., Inc.*, supra.

Defendant cites *Thompson v. Consolidated Gas Electric Light & Power, Co.*, 111 F.Supp. 719 (D.Md. 1953) in support of his assertion that no liability exists as a matter of law for LP&L. While we find the case applicable, we do not believe *Thompson* dictates a grant of defendant's motion for summary judgment in this case. Further, we disagree with defendant's contention that there are no issues of fact which remain to be decided.

In his deposition, Barry Bourgeois stated that he saw the power line and was watching it as he navigated back out toward open water. He stated that he knew that the antenna on the Captain Barry was 39 feet above the water line but assumed the power line was 40 to 50 feet above the water line. Bourgeois asserted that he had navigational charts aboard the Captain Barry but admitted he did not consult them in this instance. LP&L submitted a copy of the application for installation of the power line which indicates the aerial crossing was to be installed at a height of not less than 38 feet above mean sea level.

Neither witness stated that the antenna actually made contact with the power line. Bourgeois stated:

> A. From the time that I asked him to look up and see if it would hit, what he told me is that when he turned around I was still

a foot to two foot away from it. When he turned around to tell me, all he saw was the blue arc inside the cabin.

Q. Well, do you know if the antenna touched the electric line?

A. I do not.

(Deposition of Barry Bourgeois, p. 122)

The deckhand describes the incident as follows:

Q. How close did the antenna get to the power line?

MR. WARNER:

What point? At what time?

THE WITNESS:

About a foot.

EXAMINATION BY MR. NUNMAKER:

Q. Let me rephrase my question. While you were pulling the boat through the anchor line, how close did the antenna get to the power line?

A. About a foot.

Q. Did the antenna touch the power line at any time?

A. No, sir.

Q. And what happened when the antenna was a foot away?

A. I kept watching it. When I looked back at Barry to see what Barry was doing, all I seen was like a surge. Everything blew up inside the cabin.

(Deposition of Dean Santiny, pp. 40-41)

Therefore, according to verbatum testimony of the only two witneses, electricity arced or jumped from the line to the antenna when the antenna was at least one foot away. There is no indication in the record if such an incident is normal or could be a result of deteriorated electrical lines.

By this decision we do not make an evaluation of the merits of this case. Likewise, it is improper for a trial court to determine by a summary judgment whether plaintiff is likely to succeed at a trial on the merits. A motion for summary judgment is not a substitute for a trial. The court should merely determine whether an issue of material fact remains to be decided, not whether plaintiff will likely prevail. *Oiler v. Sharp Elec., Inc.*, 451 So.2d 1235 (La.App. 4th Cir.1984), writ den. 457 So.2d 1194 (La.1984).

Although a plaintiff's contributory negligence can be considered as a mitigation of damages, it does not bar recovery. The applicable rule in admiralty is use of comparative negligence. *Bulba v. Bradshaw*, supra. Plaintiff has made allegations of breach of LP&L's duty to properly maintain powerlines which present factual issues to be resolved at trial.

For the foregoing reasons the summary judgment in favor of LP&L dismissing plaintiff's suit is reversed and set aside. Costs of this appeal are assessed against LP&L. The case is remanded for further proceedings.

REVERSED AND REMANDED

COURT OF APPEAL, FIFTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, Gretna **MAR 16 1990**

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

BARRY BOURGEOIS v. L P & L Company

No. 89 CA 497

Very truly yours,

Clerk

PETER J. FITZGERALD, JR.

RECEIVED
3-19-90

GRETNA
MAR 16 '90

THE SUPREME COURT OF THE STATE OF LOUISIANA

BARRY BOURGEOIS
VS. NO. 90-C - 0798

LOUISIANA POWER & LIGHT COMPANY

— — — — — —

IN RE: Louisiana Power & Light Co.; — Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 89CA-0497; Parish of Jefferson 24th Judicial District Court Div. "N" Number 368-328

— — — — — —

May 25, 1990

Denied.

WFM

JCW

HTL

LFC

CALOGERO, C.J., DENNIS & SHORTESS, JJ., would grant the writ.

Supreme Court of Louisiana

May 25, 1990

/s/ Illegible

Clerk of Court
For the Court

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 368-328 DIVISION "N"

BARRY BOURGEOIS

VERSUS

LOUISIANA POWER & LIGHT COMPANY

FILED: Nov. 27, 1991 /s/Rosary Justice
DEPUTY CLERK

J U D G M E N T

This matter came before the Court for trial on the merits on the 4th, 5th, 6th and 27th of September, 1991.

PRESENT: LAWRENCE WIEDEMANN
WILLIAM HAZLARIS
Attorneys for plaintiff
Barry Bourgeois

RICHMOND EUSTIS
CHARLES NUNMAKER
Attorneys for defendant
Louisiana Power and Light
Company, Inc.

Considering the law, the evidence and the pleadings;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Barry Bourgeois and against defendant, Louisiana Power and Light Company, Inc., in the amount of $216,745.33, plaintiff being 66-2/3% at fault and defendant being 33-1/3% at fault, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that expert witness fees are cast as court costs and set, as follows:

1.	Dr. Howard A. Nelson	$400.00
2.	Leonard Charles Quick	$300.00
3.	George Casellas	$300.00
4.	Melville Wolfson	$300.00
5.	Daniel Cliffe	$300.00
6.	John Mundy	$100.00
7.	Charles M. Camp	$200.00
8.	Frederick M. Brooks	$300.00

GRETNA, LOUISIANA, THIS 27th DAY OF NOVEMBER, 1991.

/s/ James L. Cannella

JAMES L. CANNELLA,
JUDGE - DIV. "N"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

/s/ Rosary Justice

Deputy Clerk
24TH JUDICIAL DISTRICT COURT
Parish of Jefferson, LA.

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 368-328 DIVISION "N"

BARRY BOURGEOIS

VERSUS

LOUISIANA POWER & LIGHT COMPANY

FILED: Nov. 27, 1991 /s/Rosary Justice
DEPUTY CLERK

REASONS FOR JUDGMENT

STATEMENT OF THE CASE:

Plaintiff, Barry Bourgeois, sued defendant, Louisiana Power and Light Company, to recover for injuries and damages he suffered when he came in contact with a power line.

FINDINGS OF FACT:

Plaintiff, Barry Bourgeois, captain of the commercial fishing vessel, Captain Barry, and his deckhand, Carlton Santiny, set out on May 9, 1988 to shrimp. They shrimped in the area of Caminada Pass, near Grand Isle, on the gulf

side of the Louisiana Highway 1 bridge. This was the first time that plaintiff had shrimped in this area. Defendant owned and maintained an aerial power line which parrelled the bridge, on the gulf side. The power line was the delineation used by the Department of Wildlife and Fisheries for different shrimping areas. Plaintiff shrimped until about midnight and then anchored for the night about fifteen feet from the power line. When the anchor was set the tide was receding, moving the vessel away from the line. However, while the two men slept, the tide changed and the vessel drifted (at low tide) under the power line. When the men awoke at about 8:00 a.m. on May 10, 1988, they discovered they were on the bay side of the power line, between the power line and the bridge. The bridge has a 14 foot clearance. The antenna on the Captain Barry was 39 feet above the water line. This is computed as follows: water line to top of mast, 19 feet; antenna, 21 feet; overlap where antenna meets mast, 1 foot. The Court heard testimony from Mr. Quick for the plaintiff and from Mr. Camp for the defendant concerning the distsance between the water line and the lowest part of the power line. Mr. Quick testified it was 38 feet 1 inch and Mr. Camp testified it was 39.6 feet. The court thought Mr. Camp was more believable. However, since the vessel was on water, there was constant change caused by wave and wind action in the relative positions of the water line, power line, and top of the antenna. Plaintiff attempted to pass back underneath the power line as he had during the night. Plaintiff stationed Santiny at the bow of the vessel as a lookout. Plaintiff was in the cabin of the vessel and could not see the power line. Plaintiff started the engines and, with the engine in neutral, Santiny pulled on the anchor line moving the vessel toward the power line. As the antenna got close to the power line, a

blue arc of electrical current jumped from the power line to the antenna. High voltage electric current passed from the power line to the antenna of the Captain Barry and through the radio causing an explosion and fire in the cabin. Plaintiff was seriously injured, sustaining permanent and disfiguring physical injuries to this face, neck, shoulders, arms, chest and legs.

CONCLUSIONS OF LAW:

This case has previously been before this court on a Motion for Summary Judgment, wherein it was held that the case is within admiralty jurisdiction. *Bourgeois v. LP&L*, 556 So.2d 1292 (La.App. 5th Cir.1990). Thus, the substantive law of admiralty governs even though plaintiff brought his action in state court.

As stated by the court in *Bourgeois:*

> Under principles of federal maritime law a vessel which drifts into collision is presumed to be at fault. *James v. River Parishes Co., Inc.*, 686 F.2d 1129 (5th Cir. 1982). That presumption is a prima facia showing of negligence on the part of the moving vessel. *Brown & Root Marine Operations, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir.1967). That presumption may be rebutted by the moving vessel by a preponderance of the evidence. *James v. River Parish Co, Inc.*, supra.
>
> Although a plaintiff's contributory negligence can be considered as a mitigation of damages, it does not bar recovery. The applicable rule in admiralty is the use of comparative negligence. *Bulba v. Bradshaw*, supra.

Plaintiff found himself in a precarious position between the bridge and the power line. He was negligent in his actions which caused his vessel to drift into such a position. He exercised poor judgment in extricating himself from that position. He should have consulted navigational charts and removed his antenna. On the other hand, LP&L was negligent in its actions and its actions were a proximate cause and a cause in fact of the injuries and damages sustained by plaintiff. Defendant was not in compliance with its permit. There was no warning of the voltage on the power line poles. The inspection of the lines by sight from the bridge was inadequate. Additionally, this was a high water-traffic area and similar accidents had occurred in the past, of which defendant knew or should have known. Defendant created an interference to navigation.

Plaintiff was born on November 10, 1966; the date of the injury was May 10, 1988; the date of trial was September 4, 1991. From the date of accident to the date of trial was 3.32 years. On the date of trial the work life expectancy of the plaintiff was 34 years and his life expectancy was 48 years. The lost wages of plaintiff before trial were $6,000.00 per year. The loss of earning capacity of plaintiff after trial was $3,000.00 per year. Before trial the gross loss is $19,920.00 reduced by 15% to $16,932.00. After trial the loss of earning capacity is increased by 7.1% and discounted by 7.5%, totaling $179,382.00.

The Court itemized the damages of plaintiff, as follows:

1. PAST MEDICAL EXPENSES

West Jefferson Medical Center	$	53,717.00
Family Health Network	$	205.00
	$	53,922.00

2.	PAST LOSS OF INCOME	$ 16,932.00
3.	LOSS OF EARNING CAPACITY	$ 179,382.00
4.	PAST, PRESENT AND FUTURE, PHYSICIAL AND MENTAL, PAIN AND SUFFERING	$ 300,000.00
5.	PERMANENT DISFIGUREMENT	$ 100,000.00
	TOTAL	$ 650,236.00

The Court assesses expert witness fees as follows, and casts them as court costs:

1.	Dr. Howard A. Nelson	$400.00
2.	Leonard Charles Quick	$300.00
3.	George Casellas	$300.00
4.	Melville Wolfson	$300.00
5.	Daniel Cliffe	$300.00
6.	John Mundy	$100.00
7.	Charles M. Camp	$200.00
8.	Frederick M. Brooks	$300.00

Accordingly, the court finds that both plaintiff and defendant were guilty of negligence, with a majority of the fault being attributed to the plaintiff, and asigns two-thirds (2/3) of the fault in this accident to plaintiff and the balance, one-third (1/3), to defendant. Judgment is also rendered against defendant and in favor of plaintiff for

court costs and legal interest thereon from date of judicial demand, until paid.

GRETNA, LOUISIANA, THIS 27th DAY OF NOVEMBER, 1991.

/s/ James L. Cannella

JAMES L. CANNELLA,
JUDGE, DIV. "N"

A TRUE COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.

/S/ Rosary Justice

Deputy Clerk
24th Judicial District Court
Parish of Jefferson, La.

BARRY BOURGEOIS	*	No. 92-CA-483
VERSUS	*	COURT OF APPEAL
LOUISIANA POWER & LIGHT COMPANY	*	FIFTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH
JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NUMBER 368-328
HONORABLE JAMES L. CANNELLA, JUDGE

CHARLES GRISBAUM, JR.
JUDGE

MAY 12 1993

(Court composed of Judges Thomas J. Kliebert, H. Charles Gaudin, and Charles Grisbaum, Jr.)

EUGENE G. TAGGART,
for defendant-appellant
RICHMOND M. EUSTIS
CHARLES A. NUNMAKER
MONROE & LEMANN
201 St. Charles Avenue, Suite 3300
New Orleans, Louisiana 70170-3300

LAWRENCE D. WIEDEMANN,
for plaintiff-appellee/cross-appellant
WILLIAM N. HAZLARIS
WIEDEMANN & WIEDEMANN
821 Baronne Street
New Orleans, Louisiana 70113

AFFIRMED

This appeal concerns personal injuries sustained in an accident involving a shrimping vessel and an overhead electrical power line. We affirm.

ISSUE

The threshold question presented is whether the trial court erred in finding the defendant, Louisiana Power & Light Company (LP&L), negligent.

BASIC RECORD FACTS AND PROCEDURAL HISTORY

This matter was previously before our Court on an issue of summary judgment. *Bourgeois v. La. Power & Light Co.*, 556 So. 2d 1292 (La. App. 5th Cir. 1990), writ denied, 563 So.2d 877 (La. 1990). The facts were accurately set forth as follows:

> Barry Bourgeois, captain of the commercial fishing vessel, Captain Barry, and deckhand [sic] Carlton Santiny set out from the bay side of Grand Isle in the afternoon of May 9, 1988 to shrimp. They navigated east, around the Gulf side of Grand Isle and proceeded to Caminada Pass. It was necessary for the Captain Barry to

take the longer route around because the clearance between the water and a fixed bridge at the west end of the island on Louisiana Highway 1 would not permit safe passage for the vessel. An aerial power line[,] maintained by LP&L[,] crossed the mouth of Caminada Pass on the gulf side of the bridge.

When they arrived at the Pass, about 6:00 p.m., the two men laid anchor on the gulf side of the power line and waited for nightfall to begin shrimping operations. They shrimped until midnight. Because the power line was also the demarcation used by the Wildlife and Fisheries for the division of open shrimping areas, the Captain Barry was anchored about fifteen feet from the line for the night. When anchor was set the tide was receding, moving the vessel away from the line. However, while the crew slept, the tide changed[,] and the vessel drifted the extent of the anchor rope bringing the vessel under the line. When the men awoke at about 8:00 a.m. they discovered they were on the bay side of the power line at rising tide.

Plaintiff started the motor and navigated the Captain Barry back out toward the Gulf. The antenna on top of the mast of the Captain Barry either came in contact with or got close enough to the line to receive an arc of electricity which sent high voltage to ground through the vessel's radio[,] causing an explosion and fire in the cabin of the Captain Barry. Plaintiff, who was at the helm, was seriously injured.

Id. at 1293-94.

A bench trial on the merits was held in September 1991. The trial court, finding the plaintiff to be 66 and 2/3 percent at fault and the defendants 33 and 1/3 percent at fault, entered judgment in favor of the plaintiff in the amount of $216,745.33, a sum representing $650,236 of total damages proportionately reduced by the plaintiff's degree of fault. The judgment also cast LP&L liable for court costs, expert witnesses, and legal interest. It is from this judgment that LP&L has appealed.

ANALYSIS

In a previous decision of this matter, a panel of this Court determined that this case falls within admiralty jurisdiction. *Bourgeois, supra.* Our Court stated therein that

> [s]uch jurisdiction is proper when a tort occurs on the high seas or on navigable waters and the plaintiff can show that the wrong "bears a significant relationship to traditional maritime activity." . . . In the instant case, the accident occurred at the mouth of Caminada Bay, a navigable waterway while plaintiff was engaged in commercial shrimping activity. Thus, both the situs and nexus requirements for admiralty jurisdiction are met.

Id. at 1294 (citations omitted).

LAW

In applying the doctrine of the "law of the case," by

which an appellate court will not reconsider earlier rulings in the same case on a subsequent appeal, *Board of Levee Comm'rs of Orleans Levee Dist. v. Newport Ltd.*, 578 So.2d 191 (La. App. 4th Cir. 1991), writ denied, 584 So.2d 681 (La. 1991), writ denied, 584 So.2d 683 (La. 1991), we are bound by our previous findings. We, therefore, must decide this case under the substantive federal law of admiralty.

The United States Supreme Court has stated that "there is no doubt that the United States possesses the power to control the erection of structures in navigable waters." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 298, 85 L.Ed.2d 243 (1940). This power arises from the commerce clause of the Constitution, art. I, § 8, cl. 3, which has long been interpreted by the courts to necessarily include the power over navigation. *Id.* at 298.

In accordance with this power to control obstructions of navigable waters, 33 U.S.C. 403 provides as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the

> Secretary of the Army and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Pursuant to this authority, the United States Army Corps of Engineers on June 4, 1969 issued a permit to LP&L to "install and maintain an aerial crossing for electric power lines, across Caminada Pass," which was, by the permit, required to have a clearance height of not less than 38 feet above mean sea level. In 1970, the construction of the power line by LP&L was completed.

Mr. Leonard C. Quick, the plaintiff's expert, stated that the lowest point of the sag in the power line was 38 feet, 1 inch whereas Mr. Charles M. Camp, the expert for LP&L, testified that the lowest point in the line was 39.6 feet. The trial court found that "Mr. Camp was more believable" and, therefore, implicitly accepted that the line's height was 39.6 feet.

It is well-settled that "the trial court's determination of the credibility of the witnesses is entitled to great weight and should not be disturbed on appellate review unless manifestly erroneous. . . ." *Guy T. Williams Realty, Inc. v. Shamrock Constr. Co.*, 564 So.2d 689, 694 (La. App. 5th Cir. 1990), writ denied, 569 So.2d 982 (La. 1990) (citation omitted). After carefully reviewing the testimony of these

two experts, we cannot say that the trial court was clearly wrong. We, therefore, conclude that the height of the power line clearly met with the requirements of the Corps of Engineers' permit.

Notwithstanding the fact that LP&L satisfied the height requirements of its permit, the trial court found that LP&L was negligent and 33 and 1/3 percent at fault in the accident. In its Reasons for Judgment, the trial court stated

> On the other hand, LP&L was negligent in its actions and its actions were a proximate cause and a cause in fact of the injuries and damages sustained by plaintiff. Defendant was not in compliance with its permit. There was no warning of the voltage on the power line poles. The inspection of the lines by sight from the bridge was inadequate. Additionally, this was a high water-traffic area and similar accidents had occurred in the past, of which defendant knew or should have known. Defendant created an interference to navigation.

With due regard to our appellate standard of review, i.e., manifest error, we agree with the trial court's finding that LP&L was negligent and, therefore, liable for Mr. Bourgeois' injuries.

At the outset, we note that LP&L did comply with certain parts of its permit. Accordingly, these references by the trial court in its Reasons for Judgment, to be discussed below, are inconsistent with the law and the evidence adduced at trial.

VOLTAGE WARNINGS

Initially, the trial court found LP&L at fault in not posting warnings of the power line's voltage on its poles. The record does, indeed, reflect that no signs indicated the line's height or voltage. However, the record also shows that the signs on the poles did read "Danger. Keep Off." Furthermore, a warning on the plaintiff's antenna stated "DANGER. *WATCH FOR WIRES.* YOU COULD BE *KILLED* if this antenna comes near electrical power lines."

The testimony adduced at trial reveals that the plaintiff, who had never shrimped in this area, did have a chart on his boat indicating that the line's height was 37 feet, but that he did not refer to the chart that day nor check with anyone about the line.

Captain John Mundy, accepted by the court as an expert in, inter alia, the field of navigation, the prudence of good seamanship, and the interpretation of aids to navigation, testified that all vessels are subject to the "Rules of the Road," 33 U.S.C. § 201 et seq. The United States Supreme Court has stated that these rules are, indeed, applicable to all vessels regardless of their commercial or non-commercial nature. *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).

Thus, as Captain Mundy testified, these "Rules of the Road" place an obligation on seamen to follow ordinary practices of good seamen. As he also stated, the U.S. Coast Pilot, a book which acts as an aid to navigation, by which mariners are bound, makes reference to the instant power line, states its clearance as 37 feet, and advises that the

area is not recommended for strangers.

Importantly, Captain Mundy stated that overhead power cables are printed on charts and that there is no requirement by the Coast Guard that signs be placed on lines themselves. Additionally, we note that the Corps of Engineers' permit has no requirement of placing warning signs on the power line. We, therefore, conclude that LP&L's failure to post warning signs does not impart liability.

INSPECTION OF THE LINE

Next, the trial court found tht LP&L's "inspection of the lines by sight from the bridge was inadequate." This finding is undoubtedly based on the testimony of Mr. Merlin J. Grow, an LP&L employee stationed in Grand Isle. Mr. Grow stated that he would inspect the lines from a bridge in Grand Isle about a quarter of a mile away from the line.

We pretermit any discussion on the sufficiency of the inspection, since no physical defect in the line, discoverable by proper inspection, was alleged nor proven. The only relevance such an inspection could have is to prove that the line was not in technical compliance with its permit. As we have already determined that the line met the height requirements of the permit, we find the inspection, or lack thereof, irrelevant.

PERMIT COMPLIANCE

Next, we turn to LP&L's compliance with Section (k)

of the permit, which provides, "The permittee shall promptly comply with any future regulations or instructions affecting the work hereby authorized if and when issued in accordance with law by any Department of the Federal Government for the aid or protection of aerial navigation."

The trial court made no specific finding on this particular issue. The plaintiff contends that the line did not meet the minimum requirements of "future regulations," namely, the National Electric Safety Code (NESC), which requires a clearance of 42 feet.

As the plaintiff correctly points out, the NESC has not been adopted as a safety standard by any law or ordinance, although it may be given probative value in determining whether a breach of duty has occurred. See *Horton v. Valley Elec. Membership Corp.*, 461 So.2d 375 (La. App. 2d Cir. 1984); *Williams v. City of New Orleans*, 433 So.2d 1129 (La. App. 4th Cir. 1983). That the NESC has not been adopted by the State, parish or any administrative body was confirmed by the proffered testimony of Mr. Frederick Brooks, an expert in electrical engineering and electrical accident reconstruction.

The future regulations referred to in Section (k) are those "issued in accordance with law by any Department of the Federal Government." Because the NESC does not have the force of law, it is not included in the Section. Moreover, it is not clear that Section (k) is even applicable to this case, as it refers to regulations "for the aid or protection of aerial navigation." This is clearly not a case involving aerial navigation. We, therefore, find no breach of Section (k).

SIMILAR ACCIDENTS; CONSTRUCTIVE KNOWLEDGE OF LP&L

Finally, we turn to the plaintiff's contention that LP&L violated Section (c) of the permit which provides "That there shall be no unreasonable interference with navigation by the work herein authorized." The trial court found that LP&L did create an interference with navigation. We agree.

Importantly, we emphasize that not only did LP&L create an interference with navigation, it further created an *unreasonable* interference, as prohibited by Section (c). In so finding, we take note of the jurisprudence which indicates that a structure for which an Army Corps of Engineers' permit has been issued is sanctioned as a structure lawful under 33 U.S.C. 403. See *Pillsbury Co. v. Midland Enterprises, Inc.*, 715 F.Supp. 738 (E.D. La. 1989); *Thompson v. Consolidated Gas Elec. Light & Power Co.*, 111 F.Supp. 719 (D.Md. 1953). Compliance with this statute, alone, does not end the inquiry; rather, we must consider the totality of the circumstances to determine whether LP&L nevertheless violated its permit.

The testimony elicited at trial clearly indicates that the power line in question poses a serious risk to boaters in the area. Mr. Donald Reboul, a commercial fisherman and shrimper who has shrimped in the area for 15 years, testified that, although he has not personally had any problems with the line, he has seen other boats hit it. Mr. Louis S. Miller, Jr., another commercial fisherman, testified that he hit the same wire that Mr. Bourgeois hit, which resulted in the explosion of his boat's electronics. Additionally, Mr.

Miller stated that he has seen between five to seven other boats hit the wire.

Testimony was also elicited from Mr. Webb Cheramie, Jr., a commercial fisherman of 35 years who shrimps in Caminada Pass almost every day. He testified that he has hit the power line twice, knows of eight to ten others who have also hit the line, and has witnessed four other accidents. Furthermore, Mr. Michael D. Frazier, who lives near the bridge and who can see the lines from his house, testified that he has seen one other person hit the line.

We note there is some question as to whether LP&L had actual knowledge of boats hitting the power line. There is evidence that the instant matter is the only incident in which a lawsuit was filed. However, Mr. Merlin J. Grow, and LP&L employee stationed at Grand Isle for 26 years whose duties included the maintenance of the power line, testified that he had second-hand knowledge of boats hitting the line. As such, it follows that LP&L had constructive knowledge that its power line had been struck on several occasions and presented a dangerous threat. Moreover, the unreasonable interference with navigation posed by this power line was heightened by the wire's being uninsulated.

Thus, after carefully considering the facts and circumstances presented, we conclude that LP&L did violate a portion of its permit, namely, Section (c), in that the power line created an unreasonable interference with navigation in a highly trafficked area. Accordingly, the trial court did not commit manifest error in finding that

LP&L "was not incompliance wth its permit."

We now turn to the plaintiff's contention that the trial court erred in applying collision law. Instead, the plaintiff urges that general tort principles apply. In its Reasons for Judgment, the trial court excerpted from the previous decision of this matter the following passages:

> Under principles of federal maritime law a vessel which drifts into collision is presumed to be at fault. *James v. River Parishes Co., Inc.*, 689 F.2d 1129 (5th Cir. 1982). That presumption is a prima facie showing of negligence on the part of the moving vessel. *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967). That presumption may be rebutted by the moving vessel by a preponderance of the evidence. *James v. River Parishes Co., Inc., supra.*
>
> . . . .
>
> Although a plaintiff's contributory negligence can be consideered as a mitigation of damages, it does not bar recovery. The applicable rule in admiralty is use of comparative negligence. *Bubla v. Bradshaw*, [795 F.2d 349 (4th Cir. 1986)].

Bourgeois, supra, at 1294, 1295.

While this is the only reference to collision law in the Reasons for Judgment, and the trial court's further analysis fails to incorporate the doctrines outlined by applying the presumptions, we will nevertheless address this issue.

The plaintiff contends that collision law is inapplicable because there is simply no proof that the plaintiff's antenna collided with LP&L's power line. The plaintiff argues that the evidence supports a finding that, rather than actual contact, there was electrical arcing, which refers to the "jumping" of electricity from an electrical source to an object that comes in close proximity to the source. After reviewing the testimony of both the lay witnesses and the experts, we cannot say that the trial court's finding of actual contact is manifestly erroneous. Thus, if, indeed, the trial court determined that a collision between the antenna and the line in fact took place, the record amply supports such a finding.

QUESTION OF THE PLAINTIFF'S NEGLIGENCE

Our jurisprudence indicates that, when a moving vessel collides with a fixed object, there is a presumption that the moving vessel was at fault, and this presumption suffices to make out a prima facie case of negligence against the vessel. *Woods v. U.S., Dep't of Transp.*, 681 F.2d 988 (5th Cir. 1982); *Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724 (5th Cir. 1967). After carefully reviewing the record, we find that the plaintiff testified that, on the night before the accident or the early morning of the accident, he anchored his boat and then went to sleep. When he arose on the morning of May 10, he discovered that, because of a change in tide, his vessel had changed positions and was now on the other side of the power line. He admitted that the power line was plainly visible and that he had seen it when he anchored the boat; however, he thought he could pass underneath it.

Although the plaintiff knew that the power line was a source of "a lot of volts" and he did not know the line's height, nor did he check with LP&L or consult charts indicating the clearance of the line. Instead, since he could not see his antenna from his position (inside the cabin), he placed his deck hand to watch so that he could avoid the line. Importantly, the plaintiff testified that he could have taken the antenna down to get under the line.

Mr. Carlton Santiny, the deck hand, testified that he and the plaintiff never discussed lowering the antenna. He confirmed that neither he nor the plaintiff referred to any charts aboard the vessel before attempting to pass underneath the line. In his deposition, Mr. Santiny testified that he knew the antenna was higher than the power line and had warned the plaintiff of this fact. He also repeated this fact on the morning of the accident.

As previously stated, Captain Mundy testified that the "Rules of the Road" require that all seamen follow ordinary practices of good seamen. He enumerated the following breaches on the part of the plaintiff of this obligation: not keeping and consulting with adequate charts on the vessel, not knowing the height of the antenna when in close proximity of an overhead power cable, not selecting a good anchoring position, not posting an anchor watch to assure that the vessel did not drift, and not unbolting the antenna when attempting to pass under the power line.

The trial court found the plaintiff to be 66 2/3 percent at fault in causing the accident. After a careful review of the record and the appropriate jurisprudence, we cannot say this finding is clearly wrong. Accordingly, the trial

court's judgment dated November 27, 1991 is hereby affirmed. The parties to this appeal are to bear their respective costs.

AFFIRMED

THE SUPREME COURT OF THE STATE OF LOUISIANA

BARRY BOURGEOIS

VS. NO. 93-C - 1604

LOUISIANA POWER &
LIGHT COMPANY

— — — — — —

IN RE: Louisiana Power & Light Co.; — Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 92-CA-0483; Parish of Jefferson Twenty-Fourth Judicial District Court Div. "N" Number 368-328

— — — — — —

October 8, 1993

Denied.

WFM

JLD

JCW

HTL

CDK

ROO

HALL, J., not on panel.

Supreme Court of Louisiana

October 8, 1993

/s/ Illegible

Clerk of Court
For the Court

APPENDIX, SECTION B

DEPARTMENT OF THE ARMY

NOTE: It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. (See *Cummings v. Chicago,* 188 U.S., 410.)

PERMIT

LMNOD-NP(Caminada Bay) 32

U. S. ARMY ENGR. DISTRICT, NEW ORLEANS Corps of Engineers.

NEW ORLEANS, LOUISIANA
4 June, 1969

Louisiana Power & Light Company
142 Delaronde Street
New Orleans, Louisiana 70114

Referring to written request dated 24 March 1969, I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403), entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the

Army, to **install and maintain an aerial crossing for electric power lines,**

(Here describe the proposed structure or work.)

U. S. Department of Commerce, ESSA
Const and Geodetic Survey
ATTN: 323
Washington Science Center
ville, Md. 20852

across Caminada Bay,
(Here to be named the river, harbor, or waterway)

at a point southwesterly from the highway bridge across Caminada Bay, at

(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

Grand Isle, Louisiana, in Jefferson Parish,

in accordance with the plans shown on the drawing attached hereto **in one sheet, titled, "Proposed Aerial Crossing**
(Or drawings; give file number or other definite identification marks.)
*** * *," dated 20 February 1969,**

subject to the following conditions:

COPY TO U S C G

(a) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway, if the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the

permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U.S.Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein aauthorized is not completed on or before **the thirtieth** day of **September 19, 1972**, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

(k) The permittee shall promptly comply with any future regulations or instructions affecting the work hereby authorized if and when issued in accordance with law by any Department of the Federal Government for the aid or protection of aerial navigation.

By authority of the Secretary of the Army:

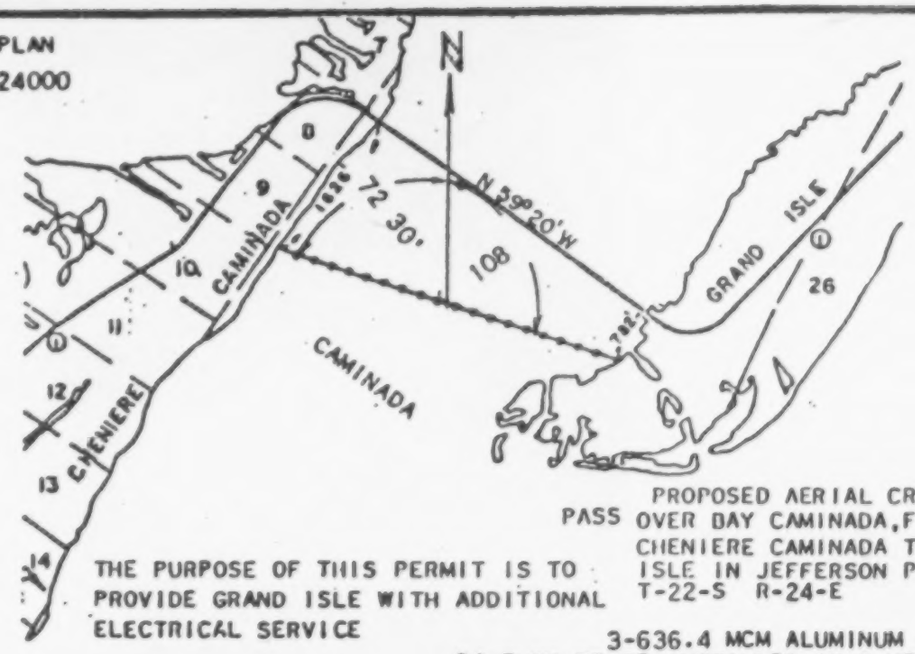
/s/ Hugh L. Brownlee
HUGH L. BROWNLEE
Asst. Chief, Operations Division
for
HERBERT R. HAAR, JR.
Colonal, CE
District Engineer

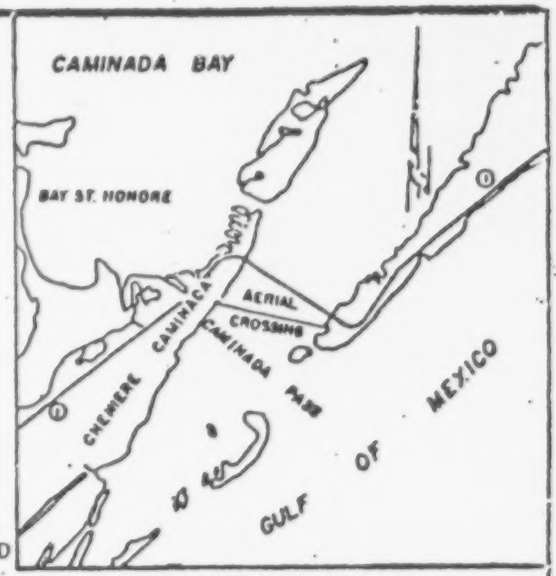
1 Incl
Drawing
ENG FORM 1721
June 1968

Replaces edition of 1 Sep 48, which is obsolete.
(ER 1145-2-303)

U S GOVERNMENT PRINTING OFFICE: 1960-0-312 340

PLAN
1:24000



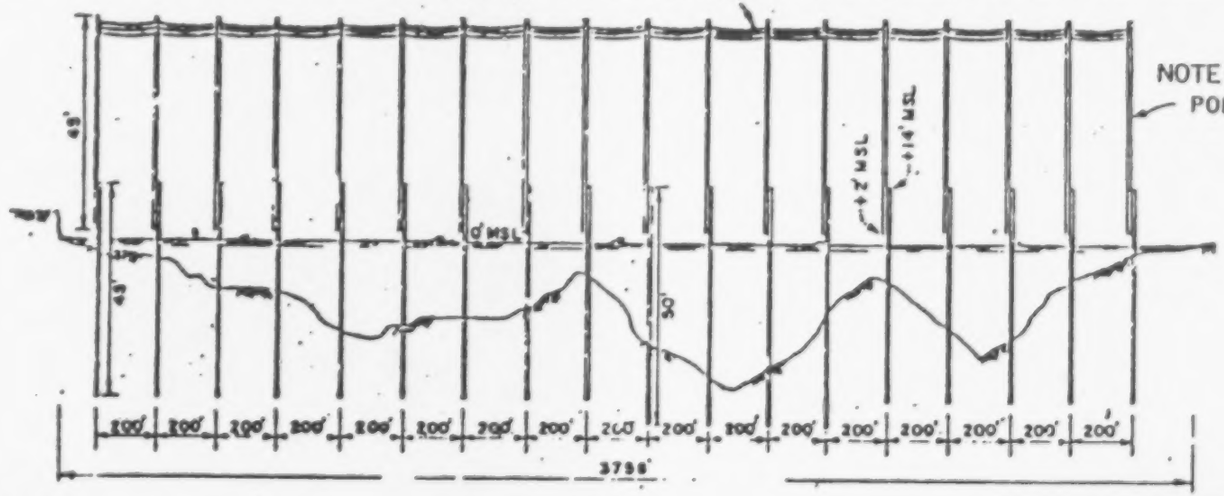


VICINITY MAP
SCALE 1:80000

PROPOSED AERIAL CROSSING PASS OVER BAY CAMINADA, FROM CHENIERE CAMINADA TO GRAND ISLE IN JEFFERSON PARISH T-22-S R-24-E

THE PURPOSE OF THIS PERMIT IS TO PROVIDE GRAND ISLE WITH ADDITIONAL ELECTRICAL SERVICE

3-636.4 MCM ALUMINUM CONDUCTORS
34.5 KV TO BE INSTALLED AT A HEIGHT OF NOT LESS THAN 38' ABOVE MSL



NOTE;
POLES ARE NOT TO SCALE

SECTION
VERTICAL; 1" 20'-0"
HORIZONTAL; 1" 60'-0"

NOTE;
SOUNDINGS AND ELEVATIONS ARE IN FEET AND REFER TO MEAN SEA LEVEL

NO.	DATE	REVISION	BY	CHK.	APP.

APPLICATION BY
LOUISIANA POWER & LIGHT CO.
DWN. BY: T. B. SMITH DATE 2-20-69
CHK. BY: T. L. B. OFF. NO. 68-473
APP. BY: A-G-0117-69

APPENDIX, SECTION C

FEDERAL STATUTORY AND REGULATORY PROVISIONS

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. Sec. 403):

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 C.F.R. §320.2(b) (1993):

Authorities to issue permits.

(b) Section 10 of the Rivers and Harbors Act ap-

proved March 3, 1899, (33 U.S.C. 403) (hereinafter referred to as section 10), prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavating from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit. . . .

33 C.F.R. §322.2(b) and (c) (1993):

Definitions.

(b) The term "structure" shall include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

33 C.F.R. §325.7 (1993):

Modification, suspension, or revocation of permits.

(a) *General.* The district engineer may reevalute the circumstances and conditions of any permit, including regional permits, either on his own mo-

tion, at the request of the permitee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend or revoke a permit as may be made necessary by considerations of the public interest. . . . Among the factors to be considered are the extent of the permitee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments, and actions the permittee has reasonable made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this section.

(b) *Modification.* Upon request by the permitee or, as a result of reevaluation of the circumstances and conditions of a permit, the district engineer may determine that the public interest requires a modification of the terms and conditions of the permit. In such cases, the district engineer will hold informal consultations with the permitee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the district engineer will give the per-

mittee written notice of the modification, which will then become effective on such date as the district engineer may establish. In the event a mutual agreement cannot be reached by the district engineer and the permittee, the district engineer will proceed in accordance with paragraph (c) of this section if immediate suspension is warranted. In cases where immediate suspension is not warranted but the district engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a meeting with the district engineer and/or a public hearing. The modification will become effective on the date set by the district engineer which shall be at least ten days after receipt of the notice by the permittee unless a hearing or meeting is requested within that period. If the permittee fails or refuses to comply with the modification, the district engineer will proceed in accordance with 33 CFR part 326. The district engineer shall consult with resource agencies before modifying any permit terms or conditions, that would result in greater impacts, for a project about which that agency expressed a significant interest in the term, condition, or feature being modified prior to permit issuance.

(c) *Suspension.* The district engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the public interest. The district engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor,

and order the permittee to stop those activities previously authorized by the suspended permit. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may within 10 days of receipt of notice of the suspension, request a meeting with the district engineer and/or a public hearing to present information in this matter. If a hearing is requested, the procedures followed in 33 CFR part 327 will be followed. After the completion of the meeting or hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing or meeting is requested), the district engineer will take action to reinstate, modify, or revoke the permit.

(d) *Revocation.* Following completion of the suspension procedures in paragraph (c) of this section, if revocation of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it. The permittee will be advised in writing of the final decision.

(e) *Regional Permits*

* * *